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Everybody's Talking: The Future of Comparative Law

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I. Introduction: Family Trees and Wandering Jews

The main objective of this paper is to discuss the future of comparative law, and I will discuss two main departments of the discipline: the culture/difference sector and the import/export store. My view is that the first department works for projects of governance, whereas the second is more appropriate for critique.

The first department is, indeed, supposed to provide the paradigm for taxonomy within the professional community of comparative law. I call the prevailing paradigm the "Family Tree Theory," which views legal cultures as more or less stable, rooted families capable of being represented by genealogical trees. I maintain that this approach has been extremely efficient in establishing a picture of the Western legal tradition as a whole, in particular serving global cultural projects of governance.

The second department, by contrast, focuses more on legal transplants and borrowings. Thus, it is rather fit to describe this theory of legal institutions as the "Wandering Jews," scuttling across the boundaries of different cultures. From this viewpoint legal systems are seen not as coherent units, but rather as having been "contaminated" by scattered traits. Although this model has been sponsored

* Professor of Law, University of Turin, Law School (Torino, Italy); International Faculty of Comparative Law (Strasbourg, France); Associate Member, International Academy of Comparative Law (Paris and New York). The collective process that gave rise to my paper has been widespread. Anyway, I can single out two meetings which have been pretty formative for the conceptions that unfold in this work: the conference on "New Approaches to Comparative Law" held at the University of Utah, School of Law (October 1996) and the conference on "Private Law Theory" sponsored by the Graduate Program and European Law Research Center, Harvard Law School (March 9-10, 1997). I wish to thank all participants. Misconceptions are obviously my own.

by some of the sacred cows of the profession, it is still at the margin, and as a result it is often misunderstood. My proposal is that this approach is particularly well suited for critical studies and should be used for ideological criticism in particular.

The recurrent themes in my argument will be how legal families are defined, how systems are grouped together, how borrowings are possible, why they happen, how it is that others are represented and who are these others.

As a result of these two departments, I divide my paper into two parts. The former reviews how comparativism can be linked with projects of cultural self-consciousness, and I use the "Birth of Comparativism" and German Historicism as a main example of how comparative law can be used to unravel a consciousness. In the latter part, I try to outline which kind of critique can be purported by a different kind of comparativism, giving a new reading to Alan Watson's theory of legal transplants and Sacco's theory of legal formants. My conclusion will be in favor of a picture of comparative law mainly as ideological criticism, in essence a critique of the way lawyers produce meanings as a key factor in the working of a legal culture.

II. Comparative Law as Governance

A. Culture and Difference

I start my argument with a picture of comparative law as an attempt to mediate between a "field" and an "audience," coping with the problem of self-definition of one culture within the legal world. It is patent to me that we can speak of import/export only after we define where the boundaries are, which means that we have stated principles of inclusion and of exclusion, of similarities and differences.[1] Culture (and the differences between them) has always been a central concern of comparative law, and the first step of the conventional approach is to divide the legal world into legal families by tracing back common roots, as genealogies to explain the present. Genealogies define who we think we are or would like to think we are. They define an "us" and a "them," and they are an essential mechanism of how identities are constructed. The "tracing back of common roots" is a work of representation, which occupies a central

1. *See* David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545.

place in current studies on culture, especially in the practice of exhibiting cultures as "others." In these exercises in mapping cultures, systems of law are joined or distinguished according to a theory of what their basic units or structures are, and according to the respective weights assigned to different elements. Thus, defining identities depends heavily on the framework assumed for mapping.

A second point of major concern for comparative law has always been the transplants and borrowings of legal models across various systems and families. In recent literature we see a renewal of interest in comparative law aimed at the introduction of newer terms to describe its aims and methods.[2] Of course, a main subject today consists of the conscious projects to export "Western" legal models into former socialist countries, to design their institutions, and in the actual drafting of model laws, particularly in the field of corporations.[3] What is amazing is that schemes to create governance through export of legal patterns are carried on notwithstanding the lack of a commonly accepted theory of legal "identities" and legal transplants.

From this standpoint I think that both the "definition of identities" as well as the "import/export" can be seen as interested, non-neutral, purposive projects of governance. Now, if we adopt this strategy of analysis to cope with "comparative law" as a discipline, we can see how much it has been an attempt to meet different audiences and their expectations. Which is to say that comparative law is not normally "transnational" at all, but rather it grows within the frameworks of different legal traditions, responding to inner needs of legal elites. From this point of view, a first unexpected aim that can be pursued by comparativism is "insulation." This strategy has been pursued in Britain where the distinction between a common law and a civil law has been used to "create" and defend a national identity in the field of the law.[4] But the same "insulation" aim has been used by

2. *See id.*; William Ewald, *Comparative Jurisprudence (I): What Was it like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995) [hereinafter *Comparative Jurisprudence (I)*]; William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995) [hereinafter *Comparative Jurisprudence (II)*]; Mitchell Lasser, *Judicial (Self) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995). These sources strongly challenge conventional comparative law scholarship and display discomfort toward the settled circles of professional comparativists.

3. *See* Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996).

4. *See* W.W HOWE, STUDIES IN THE CIVIL LAW AND ITS RELATIONS TO THE JURISPRUDENCE OF ENGLAND AND AMERICA 109 (F.B. Rothman 1980) (1896).

socialist lawyers to maintain an imagined separation of socialist countries from the rest of the world.[5] A goal also promoted by "Western" specialists with a strong professional interest in defining the peculiar subject of Soviet studies as one discipline within the Western academic world. This strategy of marking differences with "aliens," while borrowing ideas from them, was adopted by French scholars, Raymond Saleilles in particular. In his French presentation of the German Civil Code, Bürgerliches Gesetz Buch,[6] he labeled the Germans as different and "philosophical," a kind of insult among lawyers. At the same time, he was importing ideas from them.[7] We can define this strategy as a form of "etherization" of the other, and its possible impact may be a way of assimilating while denying that anything was borrowed.

At the opposite of insulation lies the strategy of comparative law for unification. It is quite apparent that comparative law has been based, to a large extent, on the search for a "common core" and has been used to deny differences among various European traditions to define a new identity with practical implications. The definition of a common European legal identity is patently directed toward the massive cross-board import/export of patterns to create a new law. Thus, once again the two departments of comparative law work together to show one possible use of comparativism. In this process the boundaries among systems are drawn between laws of "Western" countries and non-Western laws, in the form of the exoticization of African or Asian laws,[8] and in maintaining an area of common post-socialist systems as a major area of export for Western patterns. In both cases the "foreign," non-Western systems are made ready to receive Western models as necessary for development in a clear, conventional, evolutive paradigm, through inspiration of values such as "democracy," the "rule of law" and the "free market."

It is quite interesting from a comparative point of view that this great effort of the import department is intensively blurring the dis-

5. *See* Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 94 (1995).

6. *See* RAYMOND SALEILLES, ETUDE SUR LA THÉORIE GÉNERALE DE L'OBLIGATION D'APRÈS LE PREMIER PROJET DE CODE CIVIL ALLEMAND [STUDY OF THE GENERAL THEORY OF CONTRACTS ACCORDING TO THE FIRST CIVIL CODE PROJECT OF GERMANY] (1890).

7. I make special reference to the conception of *abus de droit* [abuse of a right], which, after Saleilles, became a major topic of French doctrine.

8. *See* Kennedy, *supra* note 1.

tinctions, so often cultivated in the past, among American and European systems. The difference between the French or the German model are quite forgotten, and even the sharper distinction between a common and civil law world are softened, emphasizing common economic and political structures, and setting aside the legal technicalities by which such common structures operate in the different institutional settings of the "Western" legal world.

I maintain the importance of "purposive" non-neutral character of comparative law, especially in its more neutral pretensions, such as the projects of "mapping" the world in legal systems and families. Such "mappings," which are by definition crucial to a theory of transplants, are but efforts in defining identities and in coping with "others."

B. The "Birth of Comparativism"

In this section, I outline some of the uses of comparative law to define national identity, using as an example the same birth of comparative studies in Germany.

This part of the work is a history of historical consciousness in the field of law, an inquiry into the cultural function of historical thinking, casting serious doubt over the value of history in the field of legal comparison as either a rigorous science or a genuine art.[9] The same idea of "legal evolution" has a history of its own, and its strategic character is sometimes openly credited, even in traditional literature.[10]

Ideas do not come together by themselves. They are assembled by real people with actual needs and strategies. If we look for the package of ideas lying at the basis of the Western self-consciousness in law, we must take note of the sudden emergence of German legal historicism at the beginning of the last century.[11] This is necessary in order to see how it was based on a peculiarly insulated conception of Roman law, and how this conception came to be mingled with com-

9. *See* Louis O. Mink, *Philosophical Analysis and Historical Understanding*, 21 REV. METAPHYSICS 667 (1968).

10. PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA ix (1980); *see also* E. Donald Elliot, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985) (discussing various approaches to legal evolution).

11. In the context of what Ewald has called comparative jurisprudence. For the impact of German legal historicism on America, see THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920 (Mathias Reimann ed., 1993).

parativism to produce an "Aryan model" of the Western legal tradition. By "Aryan model" I mean a theory of the strong cross-cultural links among different peoples traceable back to a past common Indo-European period, producing a framework of similarities of their various institutions.

Legal historicism was the theory adopted by the most influential German scholar of the time, Carl Frederich von Savigny,[12] "[t]he greatest jurist that Europe has produced."[13] His form of historicism was intended to replace a universalistic theory of natural law as a basis for a rational purposive discourse on the law; a paradigm which dominated the legal debate during the eighteenth century period of the Enlightenment.[14] Law, he maintained, is deeply rooted in local traditions; it is an expression of the deepest beliefs of a people, inseparable from their manners and morals, their customs and history; there is an organic link between law and the essence of a nation.[15] For him and his followers the "cult" of Roman law had to supersede a universalistic rational conception of the law.[16] Roman law became the alternative to the Law of Reason, and it was an alternative embodied within the German legal history. Of course to be a valid alternative Roman law had to be extraordinary.

Without plunging into details lying outside of the scope of the present essay, I would stress Savigny's conception of the function of Roman law as a common law for Europe and for Germany in particular.[17] Of course he had a strategy, and it was to start a process of elaboration of a national German law, which indeed started and ended in 1900 with the codification of a common private law for all of Germany. He needed a ground to build upon, and the mass of Ro-

12. On Savigny, see Ewald, *Comparative Jurisprudence (I), supra* note 2, at 2012; *see also* Symposium, *Savigny in Modern Comparative Perspective*, 37 AM. J. COMP. L. 1 (1989). On the history of German legal thought in the early nineteenth century, see JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA (1990).

13. Hermann Kantorowicz, *Savigny and the Historical School of Law*, 53 L.Q. REV. 326, 326-27 (1973) (quoting Sir John Macdonnell).

14. *See* O.F. ROBINSON ET AL., EUROPEAN LEGAL HISTORY 242 (2d ed. 1994).

15. Ewald, *Comparative Jurisprudence(I), supra* note 2, at 2016. In the Middle Ages, the German Empire adopted Roman law as the general law of the land, and it became the root of the German unfolding of a proper national law. In this sense, the Germans succeeded the Romans. *See* ROBINSON ET AL., *supra* note 14, at 188.

16. *See* GABOR HAMZA, COMPARATIVE LAW AND ANTIQUITY 34-35 (Jòzsef Szabò trans., 1991).

17. *See* Franz Wieacker, *Friederich Carl von Savigny*, 1995 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FUR RECHTGESCHICHTE 85.

man legal texts gave him the blocks for his "scientific" construction of a newer law.

The overall stress on the importance of Roman law led Savigny to a conception of Roman law as something more than just positive law; it also implied a given intellectual history[18] that was somewhat peculiar. In order to build a new German law on its basis, Roman law was studied as a complete, autonomous system that could be elaborated and developed into a modern legal system according to scientific principles. This approach produced an "ideology" of Roman uniqueness that entails an almost total exclusion of the importance of any other law.[19] What is most relevant is that this ideology of uniqueness is suggested by comparative legal studies. I mean that comparativism was first used not to bypass a national view of the law, but rather to create and support it.

It was Eduard Gans[20] in particular who conceived his work on the law of inheritance[21] in the spirit of *universalrechtgeschichte* (universal legal history). He considered Indian, Chinese, Hebrew, Islamic, Scandinavian, Icelandic, Scottish, Portuguese, Attic and Roman law, among others in his studies. The introduction to his massive work is a piece of great interest since it is based on attaining coherence. He remarks that no exclusive importance should be given to any one law at the expense of any other legal system,[22] but then he comments on the special importance of Roman law because of the large role it played in the overall history of the law.[23] It is quite remarkable that the introduction to a work covering all the world is entitled "Roman History and Roman Law."

How is it that this logic of exclusion came to be mingled with

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18. HAMZA, *supra* note 16, at 35.

19. A typical exclusion was the complete denial of any possible relevance of Hebrew law, notwithstanding that a large amount of German population was of Jewish origin. While Roman law could hardly be described as the product of the German spirit (*Volksgeist*), it has been a "miracle" of German legal historicism to deny any non-Roman influence on the development of a German national law.

20. Eduard Gans is reputed the founder of German comparative law. *See* Mitchell Franklin, *The Influence of Savigny and Gans on the Development of the Legal and Constitutional Theory of Christian Roselius*, *in* FESTSCHRIFT FÜR ERNST RABEL 145 (1954).

21. *See* EDUARD GANS, DAS ERBRECHT IN WELTGESCHICHTLICHER ENTWICKLUNG: EINE ABHANDLUNG DER UNIVERSALRECHTSGESCHICHTE [THE LAW OF INHERITANCE IN A WORLD HISTORY PERSPECTIVE: A TREATISE ON UNIVERSAL LEGAL HISTORY] (Scientia Verlag 1963) (1824-1835).

22. *Id.* at xxiii.

23. *Id.* at xxv.

comparativism? Indeed many of the Savigny's admitted followers, such as Anselm Feuerbach, Karl Theodor Puetter, Eduard Gans and Friederich W. Unger, were of the opinion that comparative studies were as important in law[24] as they were in linguistics.[25] It was a comparativism associated with the strategy of reconstructing the original common Aryan background of Western civilizations.

In 1829, this comparative trend gave birth to the *Kritische Zeitschrift fur Rechtwissenschaft und Gesetzgebung des Auslandes* (*Critical Review of Comparative Legal Studies*) as the first world journal on comparative law, which published twenty-six volumes until 1853. From a philosophical standpoint, the ideological foundation of comparative law in connection with race can be easily traced back to Hegel's theory of a close link between institutions and race,[26] and so between Roman institutions and their Indo-European background. This "Aryan" approach to comparison relied, to a large extent, on the findings of comparative linguistics. The works of Franz Bopp and Jacob Grimm played a pivotal role in the making of the "Aryan theory."[27]

This survey does not intend to criticize the scholarship embodied in those works. Certainly the authors engaged in building up the "Aryan theory" were prominent scholars with solid reputations.[28] I only want to stress the link between issues of race[29] and the style of

24. HAMZA, *supra* note 16, at 43.

25. On the relevance of Linguistics and of Herder on the German legal thought, see Ewald, *Comparative Jurisprudence (I), supra* note 2. From a more general cultural point of view, see also Robert E. Norton, *The Tyranny of Germany over Greece?, in* BLACK ATHENA REVISITED 403 (Mary R. Lefkowitz & Guy MacLean Rogers eds., 1996).

26. On Hegel's love for Europe and India and his total despise of Africa, see G.W.F. HEGEL, LECTURES ON THE PHILOSOPHY OF WORLD HISTORY 154-209 (H.B. Nisbet trans. & ed., 1975). The original work was published by his disciples after his death in 1831. On the relations between Hegel and Gans, see HAMZA, *supra* note 16, at 39.

27. 1 A.F. SCHNITZER, VERGLEICHENDE RECHTSLEHERE [COMPARATIVE LEGAL STUDIES] 13 (2d ed. 1961).

28. We may sometimes question such reputations on the basis of modern standards. In 1847, Oppert, a German expert in cuneiform texts, published a book on Indian Criminal Law, describing commonalities with Roman Law even though India had nothing to do with cuneiform writing. For a comment on his work, see J. GILSON, L'ETUDE DU DROIT ROMAIN COMPARE AUX AUTRES DROITS DE L'ANTIQUITE [ROMAN LAW COMPARED WITH OTHER ANCIENT LAWS] 28 (1899).

29. That the Indo-Europeans were intended to be one racial group is out of the question, and this is the point I am interested in here, whereas the skin color of ancient peoples is immaterial. *See* Frank M. Snowden Jr., *Bernal's "Blacks" and the Afrocentricists, in* BLACK ATHENA REVISITED, *supra* note 25, at 112. Ironically, the

legal studies in nineteenth-century Germany where the "Aryan theory" developed, evolving into studies on ancient German law.

For instance, in August Rossbach's work on marriage,[30] we find a comparative appraisal of Roman, Indian, Greek and German law which was a full realization of the Aryan approach. His theory was that the foundation of this part of the law was basically the same within the entire Indo-Germanic family. While it is beyond the scope of this work to criticize such achievements of German scholarship, it is worthwhile to note that Rossbach's findings were inspired by the theory itself; they were not the results of independent tests of the theory. His main argument was that, notwithstanding the total lack of empirical evidence, analogies between different Aryan laws were evident because of the close bonds and common kinship these peoples shared.[31]

These late nineteenth-century studies were directed towards different efforts of reconstruction of the "original Aryan law" (*Urrecht*)[32] with a strong accent on the Aryan ethnic community. They adopted the methods of comparative linguistics but reconstructed the pattern of the original law on the basis of the Roman categories. Roman law was "the template" toward which the original law evolved.

Even such an outstanding scholar as Rudolf von Jhering followed the trend in a work of comparative history on Indo-Europeans.[33] He clearly identified the law (in general) with Roman law,[34] and he traced it and its perfection back to Aryan roots. For Jhering, Roman law assumed a crucial importance even in the field of comparative law grounded on ethnic terms.[35] The Aryan theory be-

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logic of exclusion can be as strong as "color blind."

30. AUGUST ROSSBACH, UNTERSUCHUNGEN UBER DIE ROEMISCHE EHE [INVESTIGATION OF ROMAN MARRIAGE] (1853).

31. *Id.* at 37, 192, 198; *see also* HAMZA, *supra* note 16, at 44 (similar remarks).

32. B.W. LEIST, ALT-ARISCHES IUS GENTIUM [ANCIENT ARYAN JUS GENTIUM] (1889); B.W. LEIST, ALT-ARISCHES IUS CIVILE [ANCIENT ARYAN JUS CIVILE] (1892).

33. RUDOLF VON JHERING, VORGESCHICHTE DER INDOEUROPAER [THE EARLY HISTORY OF INDOEUROPEANS] (Victor Ehrenberg ed., 1884). This was von Jhering's last book and was edited by Ehrenberg after his death.

34. W. Wilhelm, *Das Recht im roemischen Recht* [*Justice in Roman Law*], *in* JHERINGS ERBE. GÖTTINGER SYMPOSION ZUR 150. WIEDERKEHR DES GEBURTSTAGS VON RÜDOLPH VON JHERING [GÖTTINGER SYMPOSIUM FOR THE 150TH ANNIVERSARY FOR THE BIRTH OF RUDOLPH VON JHERING] 228 (Franz Wieacker & Christian Wollschläger eds., 1970).

35. *See* 3 W. FIKENTCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG [COMPARATIVE LEGAL APPROACHES] 250 (1976).

came the key to understanding Roman law supremacy and uniqueness in comparison to non-Aryan laws.

It is important to note that the Aryan theory survived in our century. Garabed Amaduni, a specialist on Armenian law, described a parallel between Roman and Armenian law because of a common Indo-European ethnic origin.[36] A climax was reached in the political bias of the 1930s. The perfection of Roman law was taken for granted, and the distinction between Roman and German law narrowed, so that the latter could benefit from the qualities of the former, and a new model of an anti-individualistic Roman law was built in search of a closer adherence to the political inspiration of the Nazi movement.[37] In Ernst Shoenbauer's opinion, it was impossible to compare the laws of peoples not ethnically related, such as Germans and Egyptians.[38]

It is necessary to mention the strong challenge to the Aryan theory that was brought by Paul Koshaker[39] before the war and by Slavomir Condanari-Michler[40] after it. But the Aryan theory has been supported also by cultural comparativists such as Georges Dumézil.[41]

Since the historical work represents an attempt to mediate among the "historical field" and the audience,[42] it is not at all surprising that such a mediation was reached in the last century in Germany around the following model:

1. Romans, Germans and other peoples are all linked by their common Indo-European roots;

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36. Garabed Amaduni, *Influsso del diritto romano giustinianeo sul diritto armeno e quantità di tal influsso* [*The impact of Roman law on Armenia*], 1935 ACTA CONGRESSUS IURIDICI INTERNATIONALIS 2.

37. Ernst Schoenbauer formulated these ideas in a lecture delivered at the Deutscher Rechtshistorikertag in 1936. *See* M. STOLLEIS, GEMEINWOHLFORMELN IM NATIONALSOZIALISTISCHEN RECHT [COMMON TRENDS IN NAZI LAW] 35 (1973).

38. Ernst Schoenbauer, *Zur Frage des Eigentumsueberganges beim Kauf* [*Transfer of Property by Sale*], *in* ZEITSCHRIFT DER SAVIGNY-STIFTUNG FUR RECHTGESCHICHTE 52 (1932).

39. Paul Koschaker, *Was Vermag die Vergleichende Rechtwissenschaft zur Indogermanenfrage beizusteuern?* [*What Did We Get from Indo-Germanic Comparativism?*], 1 FESTSCHRIFT HIRT 147 (1936) (according to whom legal history should pay no particular attention to race).

40. S. Condanari-Michler, *Ueber Schuld und Schaden in der Antike* [*Negligence and Damage in Ancient Law*], 3 SCRITTI FERRINI 28 (Dott. A. Giuffré ed., 1948).

41. G. DUMEZIL, LA RELIGION ROMAIN ARCHAIQUE [EARLY ROMAN RELIGION] 585 (1966) (references marriage rites in Rome and in ancient India).

42. HAYDEN WHITE, METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE (1973).

2. Roman law was part of an Indo-European legal culture;
3. Roman law is the most perfect product of this culture;
4. Therefore, Roman law can be the basis upon which to build a modern German system as the most perfect Western legal system.

Rome is the projection of a myth. Historical consciousness and genealogies associated with it have, in my opinion, a political dimension which cannot be underestimated: it gives people something worth fighting for. It is indeed quite interesting, in contrast with German professors engaged in the Aryan theory, to compare Jewish scholars who note the presence of Semitic elements in early Rome.[43] It seems to me that this "recall to Rome" is still a way to state who we are and to refine a picture of ourselves. Of course, the picture depends on the framework, and we are forced to acknowledge that the Aryan framework has been shown to be quite successful.

C. The Western "European" Consciousness

The same mechanisms we traced in nineteenth-century German culture are still at work in today's new European setting. Those mechanisms are working to create a Western legal consciousness.

I am interested in the challenge to the Western legal tradition as a whole, and not merely to particular elements or aspects of it. This is manifested above all in the confrontation with non-Western civilizations and philosophies.[44] I think that this is a necessary effort because, in the last years, I assisted in various efforts to establish the pillars of this challenge as the basis of comparative law.

As I said, I see these efforts as strategies to legitimize Western supremacy in the field of law, through the pursuit of genealogies. Genealogies help to define who we think we are or would like to think we are. They define an "us" and a "them," and they are an essential mechanism of how identities are constructed.[45] The "tracing back of common roots" is a work of representation, which occupies a central place in current studies on culture, especially in the practice

43. *See* Reuven Yaron, *Semitic Elements in Early Rome*, *in* DAUBE NOSTER: ESSAYS IN LEGAL HISTORY FOR DAVID DAUBE 343 (Alan Watson ed., 1974).

44. *See also* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 33 (1983).

45. On the role of historical legacies as respectability in defining social identities, see BEVERLEY SKEGGS, FORMATIONS OF CLASS AND GENDER: BECOMING RESPECTABLE (1997).

of exhibiting cultures as "others."[46]

Thus the "Western root" of modern law becomes an issue. If it could be shown that the genealogical tree of Western civilization has roots in the soils of many different lands, a vision of it as a pluralistic, diverse, multiethnic and multicultural society might be legitimized.[47] However, the exclusion of non-Europeans from the foundation of "Western" tradition has been, in my mind, quite successful because it manufactures a picture of legal history that is received as plain common sense, shaping an almost universal cultural status quo.

I argue that this status quo is ungrounded, and that there are possible countermoves, in particular the use of a delegitimizing critique as an attempt to operate a background/foreground shift.[48] This kind of critique is necessary to perform a specific politically motivated operation of reversing figure and ground, showing that there are more ways to change the status quo than previously appeared. The political motive here is to question the Western cultural dominance in the field of law in favor of a multicultural view. I do not think that it is a problem of new findings but a question of new insights for a different understanding and for approaching the sources from new angles.[49] The result is to be a global rewriting of the narrative standard. Visions of law-in-history are crucial to liberal and conservative legal scholarships,[50] and critical insight must consequently focus upon them.

I want to show how strong the idea that the foundation of the Western legal mind lies on the extraordinary nature of its features, as an original offspring of human spirit, and how this reputation is linked to governance projects with practical implications.

My aim is to justify the impression that the historical consciousness on which Western man has prided himself on since the beginning of the nineteenth century may be little more than a theoretical basis for the ideological position from which Western civilization views its relationship, not only to cultures and civilizations preceding it, but also to those contemporary with it. In short I think that it is possible,

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46. *See* CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES (Stuart Hall ed., 1997).

47. *See* Guy MacLean Rogers, *Multiculturalism and the Foundations of Western Civilization, in* BLACK ATHENA REVISITED, *supra* note 25, at 428, 429.

48. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 248 (1997).

49. *See* Yaron, *supra* note 43.

50. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

particularly in the field of law, to view historical consciousness as a specifically Western prejudice by which the presumed superiority of modern, industrial society can be retroactively substantiated.[51]

It is apparent to me that such broad cultural accounts, especially when based on supposed Roman and Greek individualism, are intended to mark a sharp distinction between the West and traditional societies and to reaffirm a clear superiority of Western patterns.[52]

Due to this biased approach, the legal systems of the West are presented as part of a common tradition or "family"[53] sharing peculiar values, a similar approach to legal techniques and a net of common structures. This "family" is presented as the cornerstone of the "rule of law" in the modern world, as they were in history. In this way the modern discipline of comparative law and the old study of Roman law converge in the tracing of common roots. As we have seen, even the split between the common law and civil law traditions in the Middle Ages did not break the unity of the Roman tradition and its link with the outstanding achievements of Roman law.[54] All this entails, of course, a highly positive evaluation of the "uniqueness" of Western law as the final outcome of a tradition, as an ongoing uninterrupted process,[55] that lead us to where we are today.

Such a theory may be twined with the restatement of a project to use a renewed version of Roman law[56] as the common paste by which to build up a newer law for European countries.[57] Such a project

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51. WHITE, *supra* note 42, at 2.

52. *See* AARON GUREVICH, THE ORIGIN OF EUROPEAN INDIVIDUALISM 3 (1995).

53. *See* Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 23 (1997).

54. *See* W.W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE 21 (F.H. Lawson ed., 2d ed. 1965); *see also* Alan Watson, *Roman Law and English Law: Two Patterns of Legal Development (The Fifth Annual Brendan Brown Lecture)*, 36 LOY. L. REV. 247 (1990).

55. David Johnston, *Limiting Liability: Roman Law and the Civil Law Tradition*, 70 CHI.-KENT L. REV. 1515 (1995).

56. David Johnston, *The Renewal of the Old*, 56 CAMBRIDGE L.J. 80 (1997).

57. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION (1990). This work received a mass of comments showing its importance in today legal culture. For book reviews, see Peter B.H. Birks, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 13 J. LEG. HIST. 311 (1992); James Gordley, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 40 AM. J. COMP. L. 1002 (1992); Tony Honore, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 107 L.Q. REV. 504 (1991); David Johnston. *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 69 TUL. L. REV. 1113 (1995); Peter G. Stein, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 38 AM. J. LEG. HIST. 94 (1994);

would have quite practical implications[58] in the unveiling of Europe as a global alternative to the United States. So we face a theory supporting a governance project encouraging a particular use of comparative law[59] as a rising academic discipline[60] toward which it is highly recommended to assume a critical attitude. In fact, this project assumes the typical function of comparative law which is to elaborate the etiquette of reciprocal differences between an us and them, a center and periphery, a west and an east.[61] What is peculiar is that this theory entails a devaluation of the classical common/civil law distinction and favors a convergence theory among "modern" systems. This convergence theory depicts a more unitary Western legal family cemented on Roman pillars, in contrast with other legal cultures of the world.

I would stress the fact that the packing of the Western legal family is a peculiar enterprise of the discipline of comparative law, and the main method followed to divide the world into legal family or cultural circles[62] is still that of genealogies.[63] The elements of the field are organized into a story through an arrangement of narrative motifs according to a standard theory of the historical work.[64] The Roman roots are the inaugural motifs; the various events of the Middle Ages and the rising of the modern State characterize the transitional motifs; and the actual Western systems constitute the terminating motifs. As any effort in construction would do, this convergence entails exclusion. It is common in comparative efforts to contrast the different systems of law, presenting the inner development of each family,[65]

Tony Weir, *The Laws of Obligations: Roman Foundations of the Civilian Tradition*, 50 CAMBRIDGE L.J. 165 (1991); Simon Whittaker, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 1994 LLOYDS MAR. & COM. L. 298.

58. Reinhard Zimmermann, *Roman Law and European Legal Unity*, *in* TOWARDS A EUROPEAN CIVIL CODE 65 (A.S. Hartkamp et al. eds., 1994). It was a rising project which few expressed dissenting opinions. *See* Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997).

59. Reinhard Zimmermann, *Roman and Comparative Law: The European Perspective*, 16 J. LEG. HIST. 21 (1995) (some remarks *a propos* a recent controversy).

60. *See* Ewald, *Comparative Jurisprudence (I)*, *supra* note 2; Ewald, *Comparative Jurisprudence (II)*, *supra* note 2.

61. *See* Kennedy, *supra* note 1.

62. See the approach followed in 1 KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 2nd ed. 1987).

63. *See* Mattei, *supra* note 53, at 40 (criticizing the conventional approach).

64. *See* WHITE, *supra* note 42, at 5.

65. *See* RENÉ DAVID & JOHN E.C. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (3d ed. 1985).

something that indeed seems to be not at all comparative in nature.

Thus, from my viewpoint, the projects to draw a "map" of legal systems and to build a common core of European and Western law are really biased, non-neutral political projects of governance supported by the use of the academic discipline of comparative law. Consequently, in the following sections, I shall try to outline how Watson's theory of legal transplants and Sacco's theory of formants can be used against the establishment to produce a different critical approach to comparative law.

III. Comparative Law as Critique

A. *Spread and Dissemination*

I come now to the second half of the argument addressing the issue of import/export of legal models. In this second section, I outline a legal model that takes into account the borrowings and transplants that take place in any system of governance. This model takes the considerations enumerated in the previous section into account and uses Watson's theory of legal transplants[66] as a basis. I radically interpret this theory of legal transplants, instead of conservatively, to display how this form of conservativism can be used for delegitimation and critique. While Watson's theory is normally challenged as conservative or worse,[67] it can be a powerful tool for a critical theory of comparative law.

This is the case because the delegimative role it can play and its eventual revolutionary impact are not properly understood. I do not espouse all of Watson's assertions, and I dissent on many points. Like all theories, even Watson's theory is a package, and we can deconstruct it, using some things while rejecting others, but I also think that we retain the bulk of this theory if we adopt the following reading of it.

If we adopt the postulate of a close inherent relationship between law and the society in which it operates, legal transplants would be virtually impossible. Instead, the history and development of the law are characterized by a prodigious amount of borrowings. Legal systems are normally amalgams of patterns received from other systems. Borrowing is common throughout social life, and thus

66. *See* sources cited *infra* notes 69-71.

67. Ewald, *Comparative Jurisprudence (I)*, *supra* note 2.

the prevalence of borrowed elements in law is hardly explicable entirely in terms peculiar to law.

Legal borrowing calls for special explanation only insofar as it differs from other kinds of cultural diffusion. What is wanted in the study of the diffusion of legal ideas is not simply a catalog of borrowed "traits" but an examination of the devices for cultural sharing and selection through which legal "unity" is constructed and sustained.[68] From this standpoint the essence of a culture is contained in its contradictions, the picking up of foreign elements and the ideological presentation of them as composing a unity. Ultimately, comparative law should aim to produce a general theory about law and legal change and the relationship between legal systems and rules and the society in which they operate.[69] The history of a system of law is largely a history of borrowings of legal models from other legal systems. I think that this is a perfect statement of a critical view of the law and of legal tradition.

The conservative flavor normally perceived in Watson's approach is due to what I call Watson's "serendipity approach" to legal change. Chance, he argues, plays a major role in determining what law is borrowed.[70] Watson points out that legal transplants are not usually the result of a systematic search for the most suitable model. Social and economic factors have a much more limited and attenuated effect than normally supposed in theories of law and society, and law is largely autonomous and operates in its own sphere. He emphasizes the absurdity and casual happening of many transplants and mocks every effort to build a theory, producing a mass of possible counter-examples to quiet every possible theory.

I think that conventional criticisms of the law's autonomy singled out by Watson are misconceived and politically naive. Watson's premise is that the law is largely autonomous because it is the product of a lawmaking elite, constantly in search of a legitimation and relatively insulated from social concerns. From this point of view, his theory of legal autonomy can be used as a strong critique of the existing and unlegitimated governing elite of lawyers,[71] especially in

68. *See also* Edward Wise, *The Transplant of Legal Patterns*, 38 AM. J. COMP. L. 1 (Supp. 1990).

69. *See* Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 316 (1978).

70. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993); *See also* Ajani, *supra* note 5.

71. ALAN WATSON, THE EVOLUTION OF LAW 119 (1985).

Western countries.[72]

The theory orders a picture of law as a bundle of borrowings pursued by insulated elites, who constantly deny the fact that anything is borrowed. These elites present highly sophisticated theories of interpretation and scholarly elaborated genealogies of evolution, which are intended as strategies of self-legitimation. This reading of the theory produces a picture of the law as a battleground of "elites" competing to provide legal doctrines, rules and strategies of societal governance.[73] Since the use of "discourse" as a technical and elaborated pattern of framing the world is a peculiarly relevant strategy of self-legitimation and dominance, I think that the study of how discourses evolves and becomes borrowed/transplanted is crucial to a radical comparative legal analysis. It is on this basis that I further my argument in the next section.

B. Formants and Elites

In this section we can try to use the previously developed reading of Watson's theory in connection with the "formants" approach suggested by Sacco.[74] The theory of legal formants focuses on law as a social activity: a formant of the law is a group, type of personnel or community institutionally involved in the activity of creating law. From this point of view, we find an established legal profession in the Western legal tradition and three main types of personnel within it: the practicing lawyer, the legal policymaker (legislator, appellate court judge or upper-level administrator) and the legal scholar (law professors and the like). Judges, legislators and legal theorists are all interacting and competing formants.

These professionals produce different kinds of texts: statutes, opinions, holdings, articles, treatises, briefs, summons, broad principles, narrow rules and so on. They have an archive (previous writers, precedents, etc.) and a professional, tested style to transform old

72. *See* KENNEDY, *supra* note 48, at 284 (emphasizing the role of elites as a distinctive feature of progressive historicism in comparison with neo-Marxian analysis).

73. For a use of Watson's theory pointing at "borrowings" as "techniques" of legal elites in collaboration with political leaders with reference to Islamic law, see Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change* (pt. 1), 42 AM. J. COMP. L. 233 (1994); Donald Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change* (pt. 2), 42 AM. J. COMP. L. 543, 570 (1994).

74. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pt. 1), 39 AM. J. COMP. L. 1 (1991); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pt. 2), 39 AM. J. COMP. L. 343 (1991).

documents and produce new ones. These texts and documents, and the way they are produced, interlocked and reused by others, become a key feature in the understanding of the working of the law. To cope with these documents, the formants approach adopts a new kind of form criticism, in the widest sense, as a method to uncover, separate and explain the various materials used to produce the texts. This approach looks for differences of all kinds between and within the documents. From this standpoint, what we call the meaning of a legal text is just the link, established by professionals, between a text and another document: a plea, scholarly article or decision.

The law can then be deconstructed as a set of interlocking documents used by professionals according to their personal or institutional strategies. The legal tradition is seen as the result of an actual strategy that considers a variety of independent documents and texts competing for hegemony as interlocked in a pattern of continuity. The formant approach is then a totally comparative approach based on a kind of "external" study of the law as a form of sociological and economic appraisal of lawyers' activities, coupled with an "internal" analysis of documents as a kind of form criticism. This approach has two major implications. First, the legal process is seen as a competitive arena in which different types of elite groups fight for control. Second, there is a total refusal of the metaphysics of the unity of law and the "meaning" of legal propositions.

The main idea is to substitute the model of the law as a more or less consistent system of interrelated, hierarchically-connected propositions with a model of competing formants within the unique setting and constraints of one legal tradition.[75] The major consequence of the theory, in the field of legal interpretation and legal hermeneutics, is that a precedent, statute and the like, have only the meaning attached to it by competing elitarian groups. That meaning is placed under different institutional constraints and with different incentive structures.

From this point of view the theory draws a distinction between the working rules, the practices of a legal system and the symbolic set, the discourse used by lawyers to describe, justify, rationalize the rules and give meaning to texts and authorities. The distinction is indeed one pointing at the "ideology" of a legal tradition to be understood as the system of representations located in the everyday prac-

75. *See also* Mattei, *supra* note 53, at 101.

tices[76] and in the antagonism between "formants" in the production of meaning.

The theory implies that it is always necessary to deconstruct the law to reach its working level beyond the peculiar legal discourse of any one tradition. This deconstruction is necessary not only for the sake of comparison but also for making meaningful economic analysis of the law. Deconstructive criticism is neither a luxury nor a philosophical intruder, but a necessity coming from within. From this standpoint, the theory of formants is a global internal critique of legal discourse. It is beyond the theory's task to raise external critiques, but it certainly entails an anti-formalistic appraisal. In the field of legal hermeneutics, it disfavors the metaphysics of meaning.

Finally, the formants approach clashes with positivism as a pattern of jurisprudence. At least in the Kelsen approach, the law is depicted as a pyramid of State norms consistently improved by State officials. The sketch we now derive by the formant approach is that of several sources of the law, and the "State" looks more like a permanently unstable compromise among competing legal sources. The Harvard Legal Process School shares similar views but with a strong bias toward equilibrium and a strong commitment to classic liberal values. In the new formant approach, the effort is merely deconstructivist. Values and commitments are not metaphysically embodied in the process, but they are seen more as complex strategies of opposing legal actors. Thus, in terms of jurisprudence, the formant approach is similar to some radical form of American realism with two main differences. First, the formant approach is grounded on comparison as the tool of understanding law. Second, in the formant approach the essentials of law are not reduced to working rules, and the role of judicial narratives and discourses are as important as the practices done for the purpose of social communication and social stability. Judges are but one of the factors, more apparent but often less important than others.

For the formants approach, the "difference" or "similarity" between two legal cultures is peculiarly shaped by the legal elites and their styles in discoursive practice. Thus, the problem is how and why styles are selected, maintained and transmitted. I will make some suggestions in the next section.

76. *See* TERRY EAGELTON, IDEOLOGY: AN INTRODUCTION (1991).

C. Transplants and Strategies

From the previous sections we can maintain that law, at least within the Western legal family, evolved normally by transplants, and that the "logic" of them is directed by competing elites in search of legitimation. I concentrate on the dual aspect of "giving reasons" for a rule and "providing a legitimation" for the jurist. If we perceive the "dual nature" of the process, then we can see how the selection of opinions and discourses depend on a strategy of legitimation, and vice versa: that an elite can legitimate itself for giving opinions. From this standpoint there can be a basic strategy for all the groups competing within the legal process, namely "covering cases."

I intend to find solutions and opinions to handle still uncovered cases, filling the gaps and working out rules to cope with hard cases. If the "inner" sources and authorities do not cover a class of cases, the basic strategy suggests finding authorities "outside" and borrowing solutions from them. This strategy minimizes the possible resistance because it borrows opinions, doctrines and rules from known languages, rather than from unknown blends. Borrowing from proximate systems, rather than from distant ones, and especially borrowing from prestigious patterns, rather than from discredited patterns or models, is one aspect of the strategy of covering cases to avoid resistance. It is simply much easier to support a solution invoking a prestigious authority.

Therefore, the model I have described can be labeled as a strategic decentralized approach to diffusionism. It depends on the strategies of the borrowing systems; they pick up what they need, and they use what they borrowed to cope with their own problems. A "model" is highly prestigious if it is borrowed by many, but this depends less on the quality of the model than on the circumstances in which it meets the diverse expectations of the borrowers. Of course the "elites" of the donor system can try to design their own strategy of dominance, but as far as the process of borrowing is controlled by the elites of the receiving system, the elite's strategy can succeed only if it meets that of the receiving system. The best strategy for transplanting-elites is "ideology and propaganda" to induce the borrowing-elites to believe that the offered model meets their expectations. Thus, the basic strategy in transplanting is to use a prestigious presentation of the model, as one that can easily cover important cases in a way appreciated in the receiving country. Sometimes a reference to "efficiency" is a magic keyword in the rhetoric of borrowing-elites.

The model I propose is thus a model of "basic" strategies: "covering cases" and "prestigious propaganda."[77] Of course, chance plays a major role in any strategic game, and this explains many "serendipity" examples. However, chance can become just a particular case covered by theory. In my view, "prestige" is a label that defines complex interrelations among cultures, but certainly prestige is determined by the followers, according to their strategies, which may well be totally antagonistic toward the donor systems.

What remains after this inquiry is a new outline of the task of comparative law as an insight into the "ceaseless discursive warfare"[78] which is fought within legal cultures among competing groups of elites. This new outline is the ground upon which I reach some conclusion in the final section of my work.

IV. Conclusion: "Ideological Comparativism"

The discourse in the previous sections describes my two basic points: an attack of "unicity" [79] and a clash with the metaphysics of meaning. Both these points have an impact over theories of adjudication.

From this standpoint a major task of comparative law can be to see how institutions are packed together with a consciousness to legitimate the governance of professional elites in a number of legal systems. The activity of lawyers is basically an "ideological" activity: their job is to produce meaning to make institutions work. Comparativism, however, is a move away from this ideological mechanism. What a comparative lawyer can do, as a comparativist, is to reveal the unofficial and critique those processes of meaning production as social and political realities, particularly in a world of "contaminations." A comparative scholar should explain the details of consciousness, dismantling the various mechanisms of meaning production and casting irony over interpretive practices. As such comparative law can be a powerful tool for the critique of adjudication.

Is this a viable future? Once somebody told me that future is

77. It is not hard to see how much the French have been masters in this game at all comparative law conferences. *See also* Ajani, *supra* note 5.

78. FREDERIC JAMESON, POSTMODERNISM OR THE CULTURAL LOGIC OF LATE CAPITALISM (1991).

79. *See also* P.G. Monateri, *Règles et technique de la définition en France et en Allemagne: La Synecdoque francais* [*Rules and Definitions in France and Germany: The French Synecologies*], 1984 REV. INT. DR. COMP. 3, 45.

something we are always vaguely planning and never actually doing. Of course, we can simply make plans, and the future will take care of itself.